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August 18, 1978

His Excellency, Meldrim Thomson, Jr.  
Governor of the State of New Hampshire  
State House  
Concord, New Hampshire 03301

Your Excellency:

You have asked for our advice on the ability of the Governor and Council to request an opinion of the justices of the Supreme Court on the constitutionality of House Bill 69, an act establishing a termination schedule for use under the sunset act, which bill was vetoed on August 14, 1978. Your request has been made in connection with an inquiry from the Speaker of the House to the Governor and Council dated August 17, 1978. In his letter, the Speaker asked that the Governor and Council submit the question of the constitutionality of the bill to the Supreme Court so that the Legislature could "avoid having to spend \$10,000 of the taxpayers' money to reconvene the House." Our opinion is that the Supreme Court would not give an opinion on the constitutionality of this bill if the question was transferred by the Governor and Council.

Part II, article 74 of the New Hampshire Constitution provides:

Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.

The New Hampshire Supreme Court has limited the advisory opinions that it will issue under that article to "advice on important legal questions pending in, and awaiting consideration and action by, the body entitled to advice in the course of its duty." Opinion of the Justices, 115 N.H. 329, 330 (1975); Opinion of



the Justices, 113 N.H. 87, 88 (1973); Opinion of the Justices, 73 N.H. 625 (1906). Thus, in order for the Supreme Court to respond to a request from a branch of the Legislature or the Governor and Council, two requirements must be met: first, there must be a matter pending before the body; and, second, the matter must relate to the duties of the body seeking advice. Neither requirement is met in the present circumstances.

Upon the veto of a bill by the Governor pursuant to Part II, Article 44 of the Constitution, the measure is returned to the Legislature. When the measure is returned to the Legislature, any action on the override of the Governor's veto must obviously be taken by that body. As a result, there is no matter now pending before the Governor and Council which could be referred to the Supreme Court.

Even assuming arguendo that the issue of the constitutionality of HB 69 could be placed before the Governor and Council a decision on the constitutionality of that measure and/or on his veto is not a matter which is within the authority of the Governor and Council to decide. HB 69 was presented to the Governor for his approval or veto. Action on approved legislation is a matter in which the Constitution of this State grants sole discretion to the Governor. The question of the constitutionality of the bill is not, therefore, one which concerns "the executive duties of the governor and council." (Emphasis supplied.) Opinion of the Justices, 102 N.H. 183. It is thus not appropriate for the Governor and Council to refer such a question to the Supreme Court.

In addition to the above-mentioned considerations, the Supreme Court would not issue an advisory opinion on a request in the instant case because their opinion in this regard would call for a review of a completed act of the Executive Department. The Supreme Court has been unwilling to grant opinions in those circumstances and has construed its powers under Part II, Article 74 to be directed towards advisory opinions. In an opinion issued in 1875, the Supreme Court stated as follows:

In the view we take of this question it called for our opinion upon a past and completed act of the executive department of the government, performed in discharge of a duty expressly required of that department by the constitution. And in any aspect which the subject presents to our minds, such opinion, if given, could have no greater weight or authority than a criticism of approval or disapproval by one branch of the government upon the conduct of another coordinate branch.

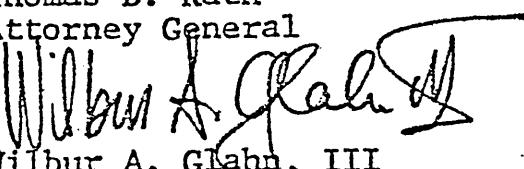
Opinion of the Justices, 56 N.H. 574, 577, (1875). This consideration controls in this case.

For the foregoing reasons, it is our opinion that the Supreme Court would not issue an advisory opinion on the question of the constitutionality of HB 69 to the Governor and Council. This opinion does not, of course, imply that an opinion would not be given to the House of Representatives or the Senate.

We trust this to be responsive to your inquiry.

Yours respectfully,

Thomas D. Rath  
Attorney General

  
Wilbur A. Glahn, III  
Assistant Attorney General

WAG, III:ab